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10/666,439	09/22/2003	Ernesto Cohen	28,437-A	8312

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EXAMINER

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ART UNIT PAPER NUMBER

3636

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/666,439
Filing Date: September 22, 2003
Appellant(s): COHEN, ERNESTO

Charles E. Temko
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 21, 2005 appealing from the Office action mailed June 23, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

Claims 1-8 have been canceled. Claims 1-6 were canceled in Applicant's amendment of August 12, 2004. Claims 7 and 8 were canceled in Applicant's amendment of April 1, 2005.

This appeal involves claims 9 and 10.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

The amendment after final rejection filed on August 11, 2005 has been entered.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. The rejection of claims 9 and 10 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention has been withdrawn. The Examiner has withdrawn the rejection under 35 U.S.C. 112, second paragraph since the Appellant has indicated on the record that the combination is not what is intended to be claimed. Note lines 13 to 14 on page 3 of the brief.

(7) Claims Appendix

Claim 9 contains a substantial error as presented in the Appendix to the brief, filed on May 15, 2006. In line 4, "article" should be "sofa", as presented in the finally rejected version of the claim. Accordingly, claim 9 has been correctly written in the Appendix to the Examiner's Answer.

(8) Evidence Relied Upon

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 9 is rejected under 35 U.S.C. 102(b) as being anticipated by Cook (3371957). Note that the hollow shell (see any of the figures) is made of resilient fabric (column 1, lines 55-58). Also note the elastic member (d), and rear panel having first and second parts (note at a²) disposed in separate planes (note the nearly parallel planes). Note that the first and second parts disposed in separate planes at a mutual angle inherently provides a degree of excess material in an area at the rear of the cushion, wherein the material comprising the first and second parts is normally concealed from view (in the crevice between the backrest and seat portions). The nature of the resilient material forming the excess material moves over the cushion when sat upon by a user. The resilient nature of the material necessarily contracts when the cushion is vacated.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cook (3371957) in view of Riley et al (5722723). Cook shows all claimed features of the instant invention with the exception of a resilient-elongated tube positioned over the excess material. Note the discussion of Cook in the above rejection under 35 U.S.C. 102. Riley et al conventionally teaches providing a resilient-elongated tube (40, as shown in Figures 8 and 9) as positioned over excess material formed by first and second parts (note rear panel of the seat cushion cover 12 in Figure 1). It would have been obvious to one having ordinary skill in the pertinent art at the time of the instant

invention to modify the primary reference in view of the teachings of the secondary reference by adding the tube member (40), and positioning it over the excess material formed by the first and second parts. This modification stabilizes the cover of Cook by pressing on the excess material, thereby reducing movement of the cover. This inherently distributes stresses over the surface of the cover, including the width, to provide a contractive force through the first and second parts.

(10) Response to Argument

Regarding the rejection of claim 9 under 35 U.S.C. 102(b) as being anticipated by Cook (3371957), Appellant states that whatever stretching is possible in the prior art reference is because of the resilient nature of the material from which the cover is made. Appellant argues that this is not the case in his construction, wherein the two parts of his back panel are disposed at a mutual angle which provides additional material which is used to allow stretching when required. It is noted that Appellant's claims fail to require stretching. The claim requires movement. Movement is not limited to stretching movement. Arguments regarding stretching are more limiting than the actual claim language. The cover of Cook is resilient in a like manner to Appellant's invention. Although the resiliency of Cook's cover does provide some degree of stretching (note the explanation in the remarks of the Final Rejection), the two parts (note at a²) of his back panel (note that each surface of the cover provides a panel) are disposed at a mutual angle which also provides additional material which is capable of allowing stretching when required. As is clear to one of ordinary skill in the pertinent art,

any flexible material that is not in a completely tensioned state can be stretched to the completely tensioned state.

Appellant argues that the stretching of his cover does not depend on elasticity of the material, but on the two-part rear panel providing additional cloth, which is returned to its initial position by the resiliency of the cushion when the seat is vacated. It is noted that resiliency of the cushion is a limitation that is absent from the claim. Arguments regarding cushion resiliency are more limiting than the actual claim language. The cover of Cook also does not have to depend on elasticity of the material to stretch, as the two parts (at a²) provide additional material that can be moved. Cook provides structure that can stretch/move either way, since it is resilient and includes excess material. In Cook, the additional material is capable of returning to its initial position by the resiliency of the cushion (c) when the seat is vacated, similarly to the instant invention. Appellant's arguments regarding the intended use of the claimed invention fails to result in a structural difference between the claimed invention and Cook. The prior art presents structure that is capable of performing the intended use, and as such, meets the claim. Appellant claims no structure that Cook fails to show.

Regarding the rejection of claim 10 under 35 U.S.C. 103(a) as being unpatentable over Cook (3371957) in view of Riley et al (5722723), Appellant indicates that the use of resilient tubes in covers for keeping excess material concealed from view at various positions of the cover is known. Appellant argues that the use of the tube in his device serves to limit the stretch to the first and second parts of the rear panel of the

cover, since the restorative force of the seat cushion would not act upon the excess material, which is not part of the back panel. This argument appears more limiting than the actual claim language. It is noted that "stretch" is not a limitation that appears in the claim. The claim also fails to limit the stretch to the first and second parts of the rear panel, as is argued. Also lacking is the limitation that "the restorative force of the seat cushion would not act upon the excess material, which is not part of the back panel".

Appellant argues that the position of at least some degree of movement of the parts when a person applies force to the device, as set forth in the Final Rejection, is highly speculative. Applicant argues that there is no mention in either Cook or Reilly that would suggest such movement occurs. The cushion and cover of Cook are resilient. In addition, Cook provides excess material. The cover (12) in Reilly clearly provides excess material in gap (22), and at least the cushion (28) is resilient. A force provided on the cushion/cover by a user sitting will necessarily cause some degree of cover movement, either based on resiliency or excess material. This is clear to one having ordinary skill in the pertinent art. Appellant argues that his arguments are not to be understood as applied to an unmeasurable minuscule degree of movement allowed by the inherent resiliency of the material from which the cover is made. This inherent resiliency of the material is clearly present. It is noted that the claim fails to include any limitation directed to the degree of movement.

Appellant also argues that his device provides actual material in the back panel to allow a stretch when the cushion is sat upon, which material is retracted to provide a smooth appearance to the cover panel overlying the cushion when the user arises, and

Art Unit: 3636

that no such movement is contemplated by either Cook or Reilly. Each of Cook and Reilly provides actual material in the back panel to allow a stretch when the cushion is sat upon, which material is retracted to provide a smooth appearance to the cover panel overlying the cushion when the user arises. It is noted that the claim fails to require the material to be retracted to provide a smooth appearance to the cover panel overlying the cushion when the user arises.

Appellant argues that the Examiner does not understand the invention since "during his first office action, he relied upon different art, and in his final action, he relies upon art which was no better than that which he originally applied". This argument appears to lack relevance and is inaccurate. The Examiner has a clear understanding of the invention. The current Examiner has relied upon Cook (3371957) under 35 U.S.C. 102(b), and Cook (3371957) in view of Riley et al (5722723) under 35 U.S.C. 103(a) in his Non-Final Office action and his Final Office action. The rejections provided in these two Office actions are nearly identical, with limited changes being necessitated by Appellant's amendment. A review of the application history clearly indicates that the application was originally assigned to another Examiner who issued a first Office action. The current Examiner has relied on his own examination of the application in issuing a non-final action and a final Office action following the previous Examiner's first Office action.

Art Unit: 3636


Appellant further argues that the Examiner has combined the teachings of Cook and Reilly and added his own speculation in the light of Applicant's disclosure, which is not an obvious test for anticipation. The Examiner has combined teachings that are obvious to one of ordinary skill in the pertinent art. The motivation for this combination has been provided in the text of the rejection above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Milton Nelson, Jr.

Conferees:

Peter Cuomo



Carl Friedman

